Master Agreement for Tertiary Transactions (“MATT”)

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Background

- Documenting a tertiary transaction after the economics have been agreed takes a significant amount of time.
- Furthermore, because some of the risks allocated between parties in documentation can change the economics, it is often preferable to have the agreement negotiated in advance.
- Participants in maturing markets wish to reduce friction and improve transparency.
- The life settlements market is maturing, and standardised transaction documentation for our market will help to achieve this.
- There are several useful precedents in other asset classes for the adoption of standard-form contracts.
- **ELSA has formed a committee to develop a form of agreement which can be used by industry participants to govern tertiary life settlements transactions.**
- The committee includes investors, external counsel and service providers.

Precedent: ISDA

- ISDA (International Swaps and Derivatives Association, http://www.isda.org) was formed in 1985.
- Developed the ISDA Master Agreement and associated definitions, credit support annexes and forms of confirmation.
- Focus is on development of legal framework for:
  - Reducing counterparty credit risk
  - Increasing transparency
  - Improving the derivatives' industry's operational infrastructure
- ISDA's support has helped members expand into emerging markets and tap into new sources of capital.
- Gross market value of derivatives globally: $20.7 trillion (as at June 2016 – "Derivatives Facts and Figures", ISDA, May 2017)

What is a Master Agreement?

- Currently, tertiary transactions are usually documented “ad hoc”, with the parties agreeing separate documentation for each individual transaction.
- A master agreement governs all tertiary transactions between the parties.
- It sets the key terms, such as:
  - Transaction and settlement process
  - Representations and warranties
  - Indemnification
  - Termination
  - Confidentiality
  - Governing law
- All transactions between the counterparties to a master agreement are governed by the terms of the master agreement.

What is a Confirmation?

- A Confirmation is a document which evidences the specific terms of an individual transaction between the parties to a Master Agreement.
- It sets out economic terms which are specific to the transaction, such as:
  - Identify the buyer and the seller
  - Describe the policy in which an interest is being transferred
  - Set the risk transfer date
  - Specify whether settlement transfers legal ownership (i.e., change of ownership at the Carrier) or beneficial ownership (i.e., a change in the records of the custodian which holds legal title to the policy)
  - Allocate risks and rewards between trade date and risk transfer date
  - Set the end date for representations/warranties which “survive” the risk transfer date
- Note that this document is CONFIRMING a trade that is already executed! It is therefore possible to execute trades using the MATT framework without needing to document them in advance.

Improving Transactional Efficiency

- Counterparties which execute a MATT will not need to negotiate “boilerplate” prior to executing a policy sale.
- The only terms which will need to be agreed are economic and mechanical: what, when, how much.
- Confirmations can be generated within a few minutes of agreeing a trade.
- Confirmations can be delivered electronically.
- Portfolio auctions will close more rapidly, as data rooms will come with a draft form of MATT included.

Risk Transfer Date/Premium Reimbursement/Settlement

- Risk Transfer Date: The date on which the Buyer acquires an entitlement to receive the death benefit:
  - Execution Date
  - Fixed agreed upon date
  - Escrow funding date (if physical settlement)
  - Settlement Date.
- Settlement Date: the date on which legal/beneficial title is transferred to the Buyer/its custodian.
- Settlement: Binary, although may need to consider lender consent for sales into/out of a leveraged deal.
- Several typical options for Premium Reimbursement:
  - Seller pays premiums from Risk Transfer Date to Settlement Date and is reimbursed by Purchaser at Settlement
  - Purchaser pays premiums from Risk Transfer Date Risk to the Settlement Date.
  - Seller pays premiums if Risk Transfer Date and Settlement Date are the same and is not reimbursed by Purchaser
- Risk Transfer Date, Settlement Date and Settlement method are all transaction-specific and thus specified in the Confirmation.

Closing Conditions

- MATT will define the closing conditions and the Confirmation will specify which if any apply to a particular transaction.
- Examples:
  - Completion of due diligence
  - Confirmation of representations and warranties
  - Confirmation from Carrier that COO/COB have been recorded
  - Confirmation from Securities Intermediary that transfer has been recorded
- Due diligence: if a lengthy period a deposit may be payable upon execution of the transaction to start a period within which due diligence must be completed.
- Closing Period: “drop dead” date by which conditions must be satisfied

Seller Representations and Warranties: Unqualified

- Standard corporate reps (duly organized, etc.)
- Solvency of seller
- Clear title and right to sell policy
- Compliance with relevant law with respect to sale
- Incontestability (NB may be qualified where seller is not original owner)
- No current investigations, suits, carrier challenges, etc.
- Delivery of all non-proprietary (i.e., external) life expectancy reports
- Policy not premium financed or the subject of a beneficial interest transfer (or PF/BI has been disclosed)
- Patriot Act compliance
- No consents required to sell
- Policy in force and not in grace
- No lapse since issuance (NB may be qualified where seller is not original owner)

Seller Representations and Warranties: Knowledge Qualified

- Policies were originally issued in compliance with applicable law
- No threatened investigations, suits, challenges, etc.
- No defenses against payment
- No COI increases notified (or has been disclosed)
- Documents are complete, unaltered and contain no false or misleading information (NB may be qualified where seller is not original owner)
- Insurable interest existed at time of issuance of the policy
- What constitutes “knowledge”?
  - Actual knowledge of a named employee (or a named team, or “senior management”)
  - After due inquiry consistent with diligence undertaken by other sophisticated market participants?

Seller Covenants

- Forward all communications received with respect to the policies/insureds.
  - Consider time period, e.g., six months
  - Carve out newly-acquired life expectancy reports
- Co-operation in the event of a post-sale challenge.
  - Subrogation
  - Indemnification
  - Compensation for reasonable costs

Other Provisions

- Confidentiality
- Cybersecurity
- Termination (material breach).
  - NB Most master agreements cause ALL related transactions to terminate in the event of material breach
  - Cross-default for breach of other material agreements, e.g., lending transactions, other market transactions
- Duration of representations and warranties (propose two years after closing).
- Indemnification: fraud, misrepresentation, breach of confidentiality.
  - Rescission right for fraud or misrepresentation?
- Choice of law/forum: New York or English.
- Limitation of liability:
  - None?
  - Cap per transaction or overall?
  - Per transaction: purchase price, purchase price plus out-of-pocket expenses, policy face amount?

Call to Action

- Your Industry Needs You!
- The ELSA Committee needs input from as many tertiary market participants as possible, in the form of:
  - Draft Purchase & Sale Agreements
  - Terms that should be included in the MATT
  - Terms that should be included in a standard form of Confirmation
  - Options that you have seen in negotiation
  - What you find acceptable and what you find completely unacceptable
- Please get involved and send us your documents, thoughts and comments.